



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Recreonics Corporation

File: B-246339

Date: March 2, 1992

John G. Deckard, Esq., Riley, Bennett & Egloff, for the protester.

Joseph M. Goldstein, Esq., Rebecca E. Pearson, Esq., and Roger J. McAvoy, Esq., Department of the Air Force, for the agency.

Paula A. Williams, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly rejected bid as nonresponsive where bidder acknowledged a material amendment by facsimile transmission, which was not permitted by the solicitation. Although contract specialist orally advised bidder that facsimile acknowledgment would be acceptable, a bidder may not rely on oral advice which is inconsistent with a solicitation.

DECISION

Recreonics Corporation protests the rejection of its low bid as nonresponsive and the award of a contract to Aquatic Renovation Systems, Inc., under invitation for bids (IFB) No. F19650-91-B-0041, issued by the Department of the Air Force to resurface the swimming pool at Hanscom Air Force Base. The Air Force rejected Recreonics' bid as nonresponsive because its facsimile acknowledgment of a material amendment was not permitted by the solicitation. The agency also concluded that Recreonics qualified its bid by submitting unsolicited descriptive literature including a copy of Recreonics' commercial warranty containing terms which were inconsistent with the warranty required by the IFB.

We deny the protest.

The Air Force synopsisized the requirement in the Commerce Business Daily on June 11, 1991, and invited interested parties to submit written requests for the solicitation package. The IFB was issued on August 13, and copies were

mailed to 38 interested parties who had submitted a written request for the solicitation package.¹ On September 6, the Air Force issued amendment 1 which extended the bid opening to September 26 at 1:00 p.m. This amendment was mailed to the 38 interested parties, including Recreonics, who were on the source list as of that date. The Air Force states that amendment 2, issued on September 16, was also mailed to all 38 interested parties. This amendment, which did not change the scheduled bid opening, among other things incorporated revised technical specifications and added new solicitation drawings.²

Although Recreonics was on the source list as of the date of issuance of the second amendment, it states that it had not received amendment 2 as of September 26, the bid opening date. On that date, Recreonics learned of the issuance of amendment 2 and telephoned the agency contract specialist to advise that it had not received this amendment. At the time of this conversation, Recreonics' bid package had been received by the agency, and the contract specialist orally advised that a facsimile acknowledgment of amendment 2 would be acceptable. Thereupon, Recreonics transmitted a facsimile acknowledgment which was received by the agency prior to bid opening.

Of the three bids received, Recreonics' bid of \$74,950 was apparently low. The agency determined that Recreonics' bid was nonresponsive for failure to properly acknowledge a material amendment because the solicitation did not permit acknowledgment of amendments by facsimile transmission. The contracting officer also concluded that Recreonics' bid was nonresponsive because it included unsolicited descriptive literature which contained a sample commercial warranty that did not conform to the material terms and conditions of the warranty required by the IFB. The contracting officer rejected Recreonics' bid and awarded the contract to Aquatic Renovation, the next low bidder at \$99,265.

With respect to amendment 2, Recreonics disputes the materiality of the amendment on the basis that it has a negligible price impact and contends that its facsimile acknowledgment was sufficient under the circumstances.

¹The agency states that it used these written expressions of interest to create a source list that was used to generate mailing labels to mail subsequent solicitation amendments.

²These drawings were inadvertently omitted from the September 16 mailing but were mailed on September 17 to all 38 interested parties.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Head Inc., 68 Comp. Gen. 198 (1989), 89-1 CPD ¶ 82, aff'd, Head Inc.--Recon., B-233066.2, May 16, 1989, 89-1 CPD ¶ 461. Even where an amendment may not have a clear effect on price, quantity, or quality, it still is considered material where it changes the legal relationship between the parties, for example, if the amendment increases or changes the contractor's obligation or responsibilities. Universal Parking Corp., 69 Comp. Gen. 31 (1989), 89-2 CPD ¶ 367. The materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Id.

Here, amendment 2 revised numerous provisions in the technical specifications, among other things making the bidder responsible to coordinate specified work being performed by other parties in conjunction with the pool resurfacing. The amendment also added a requirement that the pool membrane and attachment system supplied have the capability of attaching to a stainless steel gutter detailed in the IFB drawings. The effect of these changes was to place additional project oversight obligations on the bidder, as well as to clarify required installation features. Thus, the amendment is material because it imposed obligations and responsibilities on the bidder which were different from those imposed under the solicitation as issued.

The solicitation contained Federal Acquisition Regulation (FAR) § 52.214-3, which provides for acknowledgment of receipt of a solicitation amendment by facsimile, if facsimile bids are authorized in the solicitation. Since the solicitation did not contain FAR § 52.214-31, which authorizes the submission of bids by facsimile, the IFB prohibited acknowledgment of amendments by facsimile submission. Mabuhay Bldg. Maintenance Co., Inc., B-241908, Nov. 23, 1990, 90-2 CPD ¶ 424. The solicitation also incorporated by reference FAR § 52.214-6, which provides that oral explanations or instructions given before the award of a contract are not binding. Accordingly, Recreonics' reliance on the oral advice of the contract specialist that a facsimile acknowledgment was permissible, which was inconsistent with the terms of the solicitation, was misplaced. Auto-X Inc., B-241302.2, Feb. 6, 1991, 91-1 CPD ¶ 122.

Recreonics also argues that the agency's failure to mail the amendment sufficiently in advance of bid opening prevented the firm from acknowledging the amendment with its bid.³


The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition, and an agency must use reasonable methods to distribute solicitation materials to prospective competitors. See North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18. However, this does not make the contracting agency a guarantor that these documents will be received in every instance and, concurrent with the agency's obligations in this regard, prospective bidders have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents, especially in a sealed bid procurement. Fort Myer Constr. Corp., B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. Thus, a prospective contractor normally bears the risk of not receiving a solicitation amendment unless there is evidence (other than non-receipt by the protester) establishing that the agency failed to comply with the FAR requirements for notice and distribution of amendments, Shemya Constructors, 68 Comp. Gen. 213 (1989), 89-1 CPD ¶ 108, provided that the prospective contractor availed itself of reasonable opportunities to obtain the documents. EMSA Ltd. Partnership, B-237846, Mar. 23, 1990, 90-1 CPD ¶ 326, Western Roofing Serv., B-232666.4, Mar. 5, 1991, 91-1 CPD ¶ 242; Fort Myer Constr., Corp., B-239611, supra.

There is no evidence in the record that the agency's procedure for sending out the amendments was deficient. Recreonics was properly placed on the source list and reasonable efforts were undertaken to distribute the amendment to all parties on the list. The method of distribution for this amendment was similar to the distribution of amendment 1--which the protester received in a timely manner, and of the 38 firms to which amendment 2 was mailed, only the protester is known to have received its copy late. Although the agency source list indicates that the amendment was mailed to all bidders on September 14, a Saturday, while the amendment was in fact mailed on September 16, the following Monday, the agency reasonably explains that this reflects the fact that while the material was fully prepared for mailing on September 14, internal coordination for release of the amendment delayed the release until September 16. We find no basis to conclude that the agency acted improperly with respect to distributing amendment 2.

³Recreonics received the amendment on September 30, 4 days after bid opening.

Accordingly, Recreonics' bid was properly rejected as nonresponsive for failure to acknowledge a material amendment. Since this provided a valid basis for the agency determination, no purpose would be served by addressing the question of whether Recreonics' inclusion of a sample commercial warranty also rendered the bid nonresponsive.

The protest is denied.


for James F. Hinchman
General Counsel